IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

[redacted] 32

HOWARD FARMER,

Petitioner,

v.

ARABIAN AMERICAN OIL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

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Citations.

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Opinions Below.

The opinion of the District Court for the Southern District of New York (R. 53) is reported at 31 F. R. D. 191. The opinions of the Court of Appeals for the Second Circuit (R. 66) are reported at 324 F. 2d 359.

Jurisdiction.

The judgments of the Court of Appeals were entered on November 6, 1963 and December 18, 1963. The petition for a writ of certiorari was filed on February 3, 1964, and granted on March 9, 1964. The jurisdiction of this Court rests upon 28 U. S. C. §1254(1).

Statutes, Rules and Regulations Involved.

The statutory provisions involved are 28 U. S. C. §1821, Rule 54(d) of the Federal Rules of Civil Procedure and 28 U. S. C. §1920. They are set forth in the Appendix, pp. A-1 to A-2.

Questions Presented

1. Whether Congress intended by its 1949 amendment to 28 U. S. C. §1821, to reject the 100 mile travel limitation rule for civil cases and create a different rule of costs in civil cases from that in admiralty, and to abandon the traditional scheme of costs in American Courts which requires each party to pay his own litigation expenses, thereby denying, to a substantial number of our citizens, access to our Courts.

2. Whether the discretion as to costs granted a District Judge by Rule 54(d) of the Federal Rules of Civil Procedure is limited by the views expressed by another District Judge in entering judgment, later reversed, upon a prior trial, and whether the failure to adopt the views of the Judge at the earlier trial, constitutes an abuse of discretion.

3. Whether Rule 54(d) of the Federal Rules of Civil Procedure and 28 U. S. C. §1920 change the established rule preventing appeals from decrees for costs alone when the power of the court to assess costs against either party is not in dispute and only the mere the amount to be fixed is in issue.

Statement

Plaintiff,[1] a medical doctor, instituted this action in the New York Supreme Court to recover $4,000[2] damages for wrongful discharge. Defendant removed the cause to the United States District Court for the Southern District of New York on the ground of diversity of citizenship.

A trial before District Judge Palmieri and a jury resulted in a jury disagreement followed by a directed verdict of dismissal of plaintiff's complaint, 176 F. Supp. 45 (1959) and the entry of a judgment for costs against plaintiff in the sum of $6,601.18.

On appeal to the United States Court of Appeals for the Second Circuit, that court reversed, 277 F. 2d 46, cert. denied, 364 U. S. 824 (1960).

Thereafter defendant sought and was granted an order directing plaintiff to post security for costs in the sum of $6,000. Upon plaintiff's failure to comply with such order his action was dismissed. The Court of Appeals for the Second Circuit again reversed, 285 F. 2d 720 (1960) holding that the order constituted an abuse of discretion as it effectively precluded plaintiff from prosecuting his action because of the expense of procuring the bond.

A second jury trial before District Judge Weinfeld resulted in a verdict for defendant. The clerk taxed costs of $11,900.12, which were, on plaintiff's motion reduced by Judge Weinfeld, in the exercise of his discretion, to $831.61, allowing witness-travel costs at only sixteen dollars per witness, the equivalent of 100 miles each way at eight cents per mile.

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[1] The parties are referred to as plaintiff and defendant.

[2] Later twice amended on defendant's demand to reflect estimated damages.

On appeal by defendant, on the sole issue of the amount of the costs, to a panel of the United States Court of Appeals for the Second Circuit consisting of Chief Judge Lumbard and Judges Smith and Hays, the active judges of that court on their own motion agreed that the appeal presents a question of importance in the administration of civil litigation, namely the power of a district judge to tax costs for the transportation of witnesses to trial from places without the judicial district and more than 100 miles distant from the place of trial, and that the appeal should be considered *en banc*.

The Court below divided on the question, Chief Judge Lumbard (with whom Judges Moore, Friendly, Kaufman and Marshall concur) refusing to follow what the late Judge Clark describes in his separate dissent as "a wise public policy buttressed by the overwhelming weight of authority and by long settled federal practice" because of the expressed belief (i) that the 100-mile limitation is an anachronism which Congress had not, by its 1949 amendment to 28 U. S. C. §1821, given any compelling evidence of an intention that it be continued; (ii) that the decisions of the other Courts of Appeals upholding the 100-mile rule were either decided prior to the 1949 amendment or, where decided thereafter, the "vast majority" do no more than cite other cases; and (iii) there is no reason to extend the practice of letting trial expenses fall on the party who incurs them beyond the costs of fees for legal services.

Judge Smith (with whom the late Judge Clark and Judge Hays concur) dissents and states that the majority decision not only is contrary to the overwhelming weight of authority and decisions of the other Courts of Appeals but that it creates a different rule for costs in civil cases from that in admiralty and, more important, it abandons the traditional scheme of costs in American courts to turn

in the direction of the English practice of making the unsuccessful litigant pay his opponent's litigation expense as well as his own.

The late Judge Clark concurs in the dissent of Judge Smith and, in a separate opinion, reiterates the point that the weight of authority favors the traditional view upholding the 100 mile limitation and asserts that the majority decision represents an erroneous reading of the 1949 proviso to 28 U. S. C. §1821 and its legislative history. With respect to the majority view that the taxing judge must share his responsibility with the first trial judge by adopting that judge's views as to the *quantum* of costs to be taxed for the first trial, Judge Clark expresses the belief that it is a wise normal rule that one judge alone is responsible for the ultimate decision of a cause on trial, and that this responsibility is not to be shared with or apportioned among those who have made preliminary or interlocutory rulings.

Judge Waterman dissents, in a separate statement, from the result reached by the majority. He would affirm the judgment on appeal and would retain the 100-mile limitation to be imposed in the first instance but he would not take away from a district judge the power to disregard the limitation in the rare cases where its automatic application "can work scandalous injustice."

The majority held that the taxing judge lacked the power to disregard the first trial judge's determination as to costs for that first trial and such disregard constituted an abuse of discretion which gave rise to a right of appeal. Accordingly, the order appealed from was reversed and remanded with instructions to allow the costs taxed by the first trial judge, less the travel costs for two witnesses held improperly taxed by that judge, together with the costs as taxed by the taxing judge.

ARGUMENT.

I.

The decision below, if upheld, would substantially increase the amount of recoverable costs and thwart this country's traditional policy of insuring to all access to our courts.

The costs allowed defendant by the court below amount to $4,537.08. Added to the sum of over $3,000 (not including counsel fees) spent by plaintiff prior to his second appeal to the Court of Appeals, plus the amounts spent or incurred since such appeal in a second trial, a third appeal to the Court of Appeals, and an appeal and cross-appeal to this Court, the total amount is staggering, considered either alone or in relation to the $4 000 demanded in the complaint filed in the New York State court.

Neither the costs awarded after trial nor the sums expended in prosecuting this action would have approached anything approximating either of such figures in the state court, but plaintiff was powerless to resist defendant's removal of this cause to the federal court.

As to the item of expense connected with the prosecution of plaintiff's action, the liberal rules of the federal court which are designed to facilitate trials and the discovery of evidence make such expenditures inevitable when the adversary is resourceful, determined and rich. This item plaintiff is willing, perforce, to meet to the best of his ability in order to vindicate the right, if he can. He has, at any rate, the choice of whether he wishes to proceed or not.

The requirement that he pay defendant's expenses, on the other hand, will not only ruin the plaintiff, who, the Court

of Appeals found was unable to furnish the collateral for a $6,000 bond, 285 F. 2d 720 (1960) but also can result in effectively closing the doors of our courts to future litigants, similarly situated as it would have to this plaintiff, had not the Court of Appeals granted relief. It follows from a defendant's right to tax costs that he has a right, in the case of a non-resident plaintiff, to require a bond in an amount which will secure such defendant against the probable total of those costs.

In order, therefore, for a plaintiff to bring suit either in a federal court (or in a state court under conditions which will enable removal to a federal court) he will not only have to consider his willingness to accept the financial consequences of a defeat, but also must assure himself of the means to buy his ticket of admission to the court. An idea of how many of our citizens may be able to meet the high cost of admission may be gleaned from the excerpt of a survey made by the Bureau of Census and appearing at p. 3 of the publication "Consumer Income", Series P-60, No. 41, issued October 21, 1963 by the U. S. Department of Commerce, appearing herein in Appendix B-1.

In this country where law is supreme, where every right depends on law, where life, liberty and happiness are at stake and where the only lawful way to redress a wrong is through litigation it is imperative that the doors to our Courthouse be kept open to all.[3] That such has been the traditional policy of this country is not open to doubt. That the system of nominal costs followed by the courts in almost all of our states and by the federal courts is a necessary result of such policy is likewise not open to doubt.

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[3] Cf. address of Chief Justice Warren at a Special Meeting of the Association of the Bar of the City of New York held October 29, 1963.

The majority below profess to find from the *failure* of "* * * the Congress * * * [to give] any compelling evidence demonstrating an intention that it [the 100-mile limitation] be continued," a mandate to abandon such rule. Considering the avowed purpose of the legislation it is no more to be expected that Congress would discuss the 100-mile limitation than that it would any other aspect of the taxation of costs.

It hardly seems credible that the Congress, which in the past has not hesitated to enact legislation authorizing, in aid of certain punitive and remedial statutes, the taxation of counsel fees should, if it had decided to effect such a revolutionary change in an historic policy, do so obliquely or resort merely to half measures. Ascertaining congressional intent is at best, an exercise reminiscent of the ancient Roman form of divination, known as Observing the Heavens. Such congressional intent in this case is far, indeed, from manifesting itself with the clarity and definiteness required to support the enlargements of taxable costs. 20 C. J. S., Costs, 262, *et seq.*

However desirable a change may be, no basic change in our system of litigation, that would be effected by substantially increasing the amount of recoverable costs, should be made, except after a thorough study and analysis of federal litigation, valid objectives, and various alternate methods that could be used to achieve the objectives. Moore's Federal Practice, Second Edition, p. 1304.

Only in that way can we insure that we will keep justice democratic and that before it all men shall be equal and it shall be available to all.

II.

The limitation imposed by the court below on the taxing judge's discretion is without sanction in law and contrary to orderly and established procedure.

To confer discretion on a district judge to tax costs and impose on him, at the same time, a mandate to exercise such discretion in conformity with another judge's judgment is an anomaly in law. Rule 54(d), which grants the power, imposes no such limitation, nor, except in the decision below, does any other rule of law or regulation of which we have any knowledge.

The reasons assigned by the Court below for imposing this stricture are: (i) the first judge, because of having presided at a prior trial, had the greater opportunity to assess the necessity of particular costs incurred in the trial before him; and (ii) this circumstance, "considered in the light of the sensitive nature of the problem presented when one district judge is asked to pass upon the exercise of discretion by another, makes it inappropriate for a district judge to undertake an independent determination *de novo* of the costs allowed at a prior trial."

As to the first of these reasons, it need hardly be said that the determination as to whether and in what amount costs should be granted should be made on the basis of *all* the facts and developments to the date of the rendition of judgment. Obviously, a judge who had presided at a first trial could not possibly take into account any events beyond the date of his determination.* Thus, any observations made by an appeals court on the costs taxed at the first trial (as Judge Clarke, R 82, and Judge Weinfeld R 55, 56, noted) can have no possible effect upon those costs.

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* Note, Col. L. Rev. Vol. 64, May 1964, No. 5, P 955.

Next, to impose upon a judge an inescapable requirement that he accept the views of the first trial judge, leaves him no choice but to accept the palpably erroneous award in this case of full travel allowance to the two witnesses who travelled in company airplanes and occupied space which otherwise would have remained unoccupied.

Were such rule to prevail, a plaintiff against whom such errors were committed would have no right of appeal since it could not be said that the second judge was guilty of an abuse of discretion in adopting a bill of costs which he had no discretion to reject.

As to the court's concern for the sensibilities of the district court, we respectfully say that discretion never means the arbitrary will of the judge, but, as Chief Justice Marshall defined it, is "a legal discretion to be exercised in discerning the course prescribed by law; when that is discerned it is the duty of the courts to follow it. It is to be exercised, not to give effect to the will of the judge, but to that of the law." *Tripp* v. *Cook*, 26 Wend (N.Y.) 143, 152.

Under that definition, there is no greater reason for a district judge to resent a contrary view in the matter of the taxation of costs, than there is in other interlocutory rulings and determinations, which, under settled law of the second circuit, district judges are at liberty to decide contrary to previous decisions by other judges. *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F. 2d 131, 134 (2d Cir. 1956).

Moreover, we venture to say that, if by the time a judge ascends the bench he has not become inured to the trauma occasioned by contrariety of opinion, surely he will have become so after his first reversal.

But a proper regard for a judge's sensibilities, does not, we submit, justify any departure from established proce-

dure designed to insure justice nor the imposition upon a judge of a requirement that in the exercise of his conscience he be bound by the conscience of another.

The limitation on the taxing judge's power is, we submit, contrary to the statute and to orderly procedure, and not in the interests of justice.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

Dated: New York City,
August 24, 1964.

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APPENDIX A-1.

Statutory Provisions.

28 U. S. C. A. § 1821

CHAPTER 119—EVIDENCE; WITNESSES

§ 1821. Per Diem and mileage generally; subsistence

A witness attending in any court of the United States, or before a United States commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Regardless of the mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of $8 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance; *Provided*, That in lieu of the mileage allowance provided for herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further*, That this section shall not apply to Alaska.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day. As amended

Oct. 31, 1951, c. 655, § 51(a), 65 Stat. 727; Sept. 3, 1954, c. 1263, § 45, 68 Stat. 1242; Aug. 1, 1956, c. 826, 70 Stat. 798.

RULE 54(d) FEDERAL RULES OF CIVIL PROCEDURE

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

28 U. S. C. A. § 1920

§ 1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree. June 25, 1948, c. 646, 62 Stat. 955.

Appendix B-1.

Income of Families and Persons in the United States.

Table B.—FAMILIES AND UNRELATED INDIVIDUALS BY TOTAL MONEY INCOME, FOR THE UNITED STATES: 1947 AND 1950 TO 1962

(In current dollars; percent not shown, where less than 0.5)

Total money income (current dollars)	1962	1961	1960	1959	1958	1957	1956	1955	1954	1953	1952	1951	1950	1947
FAMILIES														
Number thousands	46,998	46,341	45,435	45,062	44,202	43,714	43,445	42,843	41,934	41,202	40,832	40,578	39,929	37,237
Percent	100	100	100	100	100	100	100	100	100	100	100	100	100	100
Under $3,000	20	21	22	23	24	25	26	29	31	30	33	36	43	49
$3,000 to $4,999	19	20	20	22	25	26	27	30	31	32	34	35	34	31
$5,000 to $6,999	22	22	24	24	24	25	23	22	21	21	20	18	14	12
$7,000 to $9,999	21	21	20	19	17	16	16	13	11	12	9	7	6	5
$10,000 to $14,999	13	11	10	9	8	6	6	5	5	4	3	3	3	3
$15,000 and over	5	5	4	3	2	2	2	1	1	1	1	1		
Median income	$5,956	$5,737	$5,620	$5,417	$5,087	$4,971	$4,783	$4,421	$4,173	$4,233	$3,890	$3,709	$3,319	$3,031
UNRELATED INDIVIDUALS														
Number thousands	11,013	11,163	10,900	10,702	10,751	10,313	9,658	9,766	9,623	9,514	9,705	9,142	9,366	8,165
Percent	100	100	100	100	100	100	100	100	100	100	100	100	100	100
Under $3,000	66	67	67	70	70	72	73	77	78	78	78	81	85	89
$3,000 to $4,999	16	17	20	18	19	18	19	17	16	17	17	16	13	8
$5,000 to $9,999	15	13	12	10	9	9	7	5	5	4	4	3	2	2
$10,000 to $14,999	2	2	1	1	1	1	1	1	1	1	1			1
$15,000 and over	1	1		1	1									
Median Income	$1,753	$1,755	$1,720	$1,556	$1,486	$1,496	$1,426	$1,316	$1,224	$1,394	$1,409	$1,195	$1,045	$ 980

Reprint from Publication Entitled Consumer Income, Series P-60 No. 41, October 21, 1963.
Issued by U. S. Dept. of Commerce, Bureau of Census